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No. 96-643

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed October 21, 1996
Petition For Writ Of Certiorari Granted February 24, 1997

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<i>The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:</i>	
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RELEVANT DOCKET ENTRIES**DATE: 1995**

- March 16 Citizens for a Better Environment's notice of intent to sue letter to The Steel Company sent.
- Aug. 7 Citizens for a Better Environment's Complaint against the Steel Company for Injunctive Relief and Civil Penalties filed in U.S. District Court for Northern District of Illinois, Eastern Division.
- Sept. 5 The Steel Company's motion to dismiss filed.
- Dec. 19 Opinion and judgment of District Court, granting The Steel Company's motion to dismiss.

DATE: 1996

- Jan. 17 CBE's notice of appeal filed.
- July 23 Opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit, reversing decision of District Court.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

CITIZENS FOR A BETTER ENVIRONMENT, a not-for-profit corporation,) (Filed Aug. 7, 1995)
Plaintiff,)
v.)
THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY, a corporation,)
Defendant.)
95 C 4534	

CITIZENS FOR A BETTER ENVIRONMENT'S COMPLAINT AGAINST THE STEEL COMPANY FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

INTRODUCTION

1. This is a citizen suit filed by Citizens for a Better Environment ("CBE") against The Steel Company for violating the Emergency Planning and Community Right-to-Know Act ("EPCRA" or "the Act"), of 1986, 42 U.S.C. § 11001, *et seq.* for eight years. The Steel Company failed to inform the government and the public, including CBE and its members, of the presence and use at its facility, and thus, in the community, of large amounts of hazardous and toxic chemicals. EPCRA, which was enacted in 1986, has resulted in the elimination of over a million

tons of toxic and hazardous chemicals into our environment. The government and its citizens use the information filed under EPCRA: (a) to learn about toxic and hazardous chemicals to which they are, or may be, exposed; (b) to develop plans for, and respond to, accidental releases of toxic and hazardous chemicals into the environment; (c) to work with companies to reduce the use of toxic and hazardous chemicals; and (d) to gather data and conduct research on these toxic and hazardous chemicals. By withholding information on the presence and use of toxic and hazardous chemicals at its facility, The Steel Company has deprived citizens, including members of CBE, of information which Congress has determined is crucial to the public health and welfare. CBE seeks a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorney and expert witness fees, for defendant's repeated violations of Sections 312 and 313 of EPCRA, 42 U.S.C. §§ 11022 and 11023.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under Section 326(a) of EPCRA, 42 U.S.C. § 11046(a).
3. On March 16, 1995, plaintiff gave notice of defendant's violations of EPCRA and its intent to file suit to the Administrator of the U.S. Environmental Protection Agency (EPA), to the Regional Administrator of the EPA Region V, to the Illinois Environmental Protection Agency (IEPA), the Illinois Governor, and defendant, as required by § 326(d)(1) of the Act, 42 U.S.C. § 11046(d)(1). A copy of the Notice Letter is attached as Exhibit A.

4. More than sixty (60) days have passed since notice was served. The EPA has neither commenced, nor is diligently pursuing, an administrative order or a civil action with respect to the violations.

5. Venue is appropriate in the Northern District of Illinois pursuant to Section 326(b)(1) of EPCRA, 42 U.S.C. § 11046(b)(1), in that the violations of EPCRA occurred and occur in this District.

PLAINTIFF

6. Plaintiff, Citizens for a Better Environment (CBE), sues on behalf of both itself and its members. CBE is a midwest-based, not-for-profit corporation organized under the laws of Illinois in 1971, with offices in Illinois, Minnesota and Wisconsin. CBE is a membership organization with approximately 30,000 members and over 180,000 contributors. CBE members are located throughout the State of Illinois, but predominately in northeastern Illinois, including the southeast side of Chicago where defendant's facility is located. CBE's Illinois office is located in Chicago, Illinois.

7. CBE attempts to prevent environmental health threats through research, advocacy, public education, and citizen involvement. CBE also seeks to increase the public's awareness of the impact of human endeavors upon the natural environment and to further the public's understanding of the need of the people to live within the natural environment without destroying its ecology.

8. CBE seeks, acquires, and uses data reported by facilities under EPCRA in its programmatic activities.

Based on this data, CBE reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws. CBE's use of this data depends on the timely and complete submission of information pursuant to EPCRA. CBE's right to know about such releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by defendant's actions in failing to provide timely and required information under EPCRA.

9. Members of CBE reside, own property, engage in recreational activities, breathe the air, and/or use areas near defendant's facility. These members use and enjoy the benefits of natural resources near facilities which store, process, or otherwise use, toxic and hazardous substances listed under Section 312 and 313 of EPCRA. CBE's members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit. The safety, health, recreational, economic, aesthetic and environmental interests of CBE's members and their right to know about such releases have been, are being, and will be adversely affected by defendant's actions in failing to file timely and required reports under EPCRA.

DEFENDANT

10. Defendant, The Steel Company a/k/a Chicago Steel & Pickling Company is a corporation organized under the laws of the State of Illinois. Since at least 1987 to the present, defendant has owned and/or operated industrial facilities at 12500 S. Stony Island Avenue, Chicago, Illinois. As part of its operations, defendant removes rust from steel coils, a process otherwise referred to as steel pickling.

FACTS

11. Defendant is the owner and operator of a steel pickling facility that removes rust from large steel coils. The steel is uncoiled and put through an acid bath to remove all rust. It is then oiled and re-coiled.

12. From 1987 to the present, defendant has had 10 or more full-time employees at its facility, and its Standard Industrial Classification code is 3479.

13. From 1987 to the present, defendant was required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 *et seq.*

14. From 1987 to the present, defendant has had extremely hazardous substances present at its facility in amounts greater than or equal to 500 pounds and other hazardous substances present in amounts greater than or equal to 10,000 pounds. These chemicals include, but are not limited to:

Hydrochloric Acid (CAS #7647-01-0)

Sodium Hydroxide (CAS #1310-73-2)

Ferrous Chloride (CAS #7758-94-3)

15. From 1987 to the present, defendant "otherwise used," as the term is defined in the Act, more than 10,000 pounds per year of one or more toxic chemicals listed at 40 C.F.R. 372.65, including hydrochloric acid (CAS #7647-01-0).

COUNT I**Failure to Report Emergency and Hazardous Chemical Inventory Forms**

16. Plaintiff restates and incorporates by reference the above-numbered paragraphs.

17. The requirements of Section 312(a) of EPCRA, 42 U.S.C. §11022(a), apply to owners or operators of a facility which are required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 *et seq.*, and have the hazardous chemical present at or above the minimum threshold quantity for reporting at any one time. For extremely hazardous substances that are listed in the Appendices of 40 C.F.R. Part 355, the minimum threshold level for reporting is 500 pounds or the threshold planning quantity (TPQ), whichever is lower. For all other hazardous chemicals the minimum threshold level for reporting is 10,000 pounds.

18. The owners and operators of such facilities are required under Section 312(a), 42 U.S.C. § 11022(a), to

prepare and submit an emergency and hazardous chemical inventory form, on or before March 1, 1988, and annually thereafter on March 1, to the appropriate local emergency planning committee (LEPC), the state emergency response commission (SERC) and the fire department with jurisdiction over the facility.

19. These chemical inventory forms provide information concerning the maximum amount, the average daily amount and the location of hazardous chemicals present at the facility.

20. Facilities that fail to submit chemical inventory forms after the March 1 deadline have failed to comply with the annual reporting requirement and have defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the presence of hazardous chemicals, to assist in local emergency planning and response, and to aid in the development of appropriate regulations, guidelines and standards.

21. From 1987 to the present, Defendant owned and operated a facility that has had hazardous and extremely hazardous chemicals present at or above the minimum threshold level for reporting, and is therefore subject to the requirements of Section 312 of EPCRA, 42 U.S.C. § 11022.

22. Defendant failed to submit chemical inventory forms to the SERC, the LEPC and the appropriate fire department, on or before March 1, 1988, and annually thereafter through March 1, 1995.

23. Defendant's violations of Section 312 of the Act have been numerous and repeated. Each day that each

toxic chemical is not reported constitutes a separate violation of EPCRA. Since 1988, defendant has committed over 19,000 violations of Section 312 of EPCRA. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes civil penalties in an amount not to exceed \$25,000 for each violation of the requirement to submit chemical inventory forms.

COUNT II

Failure to Report Toxic Chemical Release Forms

24. Plaintiff restates and incorporates by reference paragraphs 1 through 14.

25. The requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, apply to owners and operators of facilities that have ten or more full-time employees, are in Standard Industrial Classification Codes 20-39 (SIC Codes 2000-3999), and that manufacture, process or otherwise use designated toxic chemicals in excess of the threshold quantities established under 42 U.S.C. § 11023(f). A list of designated chemicals is set forth in 40 C.F.R. Part 372.65.

26. The owners and operators of such facilities are required under Section 313, 42 U.S.C. § 11023, to complete and submit to the EPA and the designated state agency, on or before July 1, 1988, and annually thereafter on or before July 1, a toxic chemical release form (Form R) for each listed toxic chemical manufactured, processed, or otherwise used in excess of the threshold quantities. Among other things, each Form R must contain data reflecting annual releases of toxic chemicals into all environmental media, i.e., the air, land and water.

27. Facilities that fail to submit chemical release forms after the July 1 deadline have failed to comply with the annual reporting requirement and have defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the releases of hazardous chemicals into their environment, to assist governmental agencies and others in the conduct of research and data gathering, and to aid in the development of appropriate regulations, guidelines and standards.

28. From 1987 to present, defendant owned and operated a facility that manufactured, processed or otherwise used a designated chemical over the threshold quantity for reporting, and was therefore subject to the requirements of Section 313 of EPCRA, 42 U.S.C. § 11023.

29. Defendant failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter on July 1, 1994.

30. Defendant's violations of the Act have been numerous and repeated. Each day that each toxic chemical is not reported constitutes a separate violation of EPCRA. Since 1988, defendant has committed over 2500 violations of Section 313 of EPCRA. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes civil penalties in an amount not to exceed \$25,000 for each violation of the requirement to submit chemical release forms.

RELIEF

WHEREFORE, plaintiff respectfully requests this Court to grant the following relief:

A. Issue a declaratory judgment that defendant, The Steel Company, has violated Sections 312 and 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11022 and 11023;

B. Authorize plaintiff, for the period beginning on the date of the Court's Order and running at least one year thereafter, to inspect defendant's facility and records for compliance with all of the provisions of EPCRA, with the cost of inspection to be borne by defendant;

C. Order defendant to provide plaintiff, for a period beginning on the date of the Court's order and running at least one year thereafter, with a copy of all reports and other documents which defendant submits to the EPA or to the SERC regarding defendant's compliance with the provisions of EPCRA at the time it is submitted to these authorities;

D. Order defendant to pay civil penalties of \$25,000.00 per day of violation for each violation of Sections 312 and 313, 42 U.S.C. §§ 11045(c) and 11046(c).

E. Award plaintiff all of its costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of the Act, 42 U.S.C. § 11046(f); and

F. Award such other and further relief as this Court deems appropriate.

DATED: August 7, 1995

Respectfully submitted,
CITIZENS FOR A BETTER ENVIRONMENT
By: /s/ Stefan Noe
One of its attorneys

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EXHIBIT A

**Citizens for a
Better
Environment**

March 16, 1995

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. K. Rajkumar, President
The Steel Company
12500 S. Stony Island Avenue
Chicago, Illinois 60633

Mr. James N. Johnson, Registered Agent
The Steel Company
12500 S. Stony Island Avenue
Chicago, Illinois 60633

**Re: Notice of Intent to Sue Pursuant to the Citizen
Suit Provision of the Emergency Planning and
Community Right to Know Act.**

Dear Mr. Rajkumar and Mr. Johnson:

NOTICE IS HEREBY GIVEN by Citizens for a Better Environment ("CBE"), pursuant to section 326(d) of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001-11050, and all pertinent regulations promulgated thereunder, of CBE's intent to file suit against The Steel Company a/k/a Chicago Steel & Pickling Company, ("The Steel Company") for violations of EPCRA.

Section 326(d) of EPCRA, 42 U.S.C. § 11046(d), requires that sixty (60) days prior to the institution of a civil action under the authority of Section 326(a), 42 U.S.C.

§ 11046(a), a citizen must give notice of intent to sue. CBE will file a civil action in federal district court after the expiration of this notice period.

This lawsuit will allege, upon information and belief, that The Steel Company, as the owner or operator of the manufacturing facility located 12500 S. Stony Island Avenue, Chicago, Illinois ("the facility"), has failed to accurately complete and submit:

- A. Emergency and Hazardous Chemical Inventory Forms ("Tier One or Tier Two Forms") by March 1, 1988, and annually thereafter, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022; and
- B. Toxic Chemical Release Forms (EPA Form Rs) by July 1, 1988, and annually thereafter, pursuant to Section 313 of EPCRA, 42 U.S.C. § 11023.

As the owner or operator of the facility, The Steel Company is responsible for its failure to submit the above-referenced forms.

CBE is informed and believes that in The Steel Company's operations it has used or stored extremely hazardous substances or hazardous substances which exceed the threshold planning quantities for reporting. The Steel Company has failed to complete Tier One or Tier Two Inventory Forms for those chemicals.

Furthermore, CBE is informed and believes that in the operations at the facility, The Steel Company has "manufactured," "processed" or "otherwise used" one or more "toxic chemicals," as those terms are defined by EPCRA, in excess of statutory thresholds and is thereby subject to

the reporting requirements of section 313 of EPCRA. The chemicals used above the threshold reporting quantities includes, but is not limited to, Hydrochloric Acid (CAS #7647-01-0). CBE believes that The Steel Company continues to be in violation of EPCRA.

CBE will request that the court enforce the requirements of Sections 312 and 313 of EPCRA, impose civil penalties of \$10,000 per day and \$25,000 per day of violation from the required dates of submittal, and award costs of litigation (including reasonable attorneys' and expert witness' fees) to CBE.

During the notice period we will be available to discuss resolution of The Steel Company's noncompliance with the law. If you wish to avail yourself of this opportunity, please contact me.

Sincerely,

By: /s/ <u>Stefan A. Noe</u>	By: /s/ <u>James D. Brusslan</u>
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	Citizens for a Better
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cc: Carol Browner
Administrator
United States Environmental Protection Agency
401 M. Street, S.W./1101
Washington, DC 20531

Valdus Adamkus
 Regional Administrator
 EPA Region V
 77 West Jackson Blvd.
 Chicago, Illinois 60604

Mary A. Gade, Director
 Illinois Environmental Protection Agency
 2200 Churchill Road
 Springfield, Illinois 62706

Governor
 The Honorable Jim Edgar
 State House
 Springfield, Illinois 62706

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION**

CITIZENS FOR A BETTER)
ENVIRONMENT, a) Case No. 95 C 4534
not-for-profit corporation,)
Plaintiff,) Judge Marovich
v.)
THE STEEL COMPANY, a/k/a) Magistrate
CHICAGO STEEL AND) Judge Pallmeyer
PICKLING COMPANY,) (Filed Sept. 5, 1995)
Defendant.)

**THE STEEL COMPANY'S MOTION TO DISMISS
 PLAINTIFF'S COMPLAINT**

Defendant, The Steel Company, by its undersigned attorneys and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, requests that this Court enter an order dismissing the complaint of plaintiff, Citizens for a Better Environment ("CBE"). In support of its motion, The Steel Company states as follows:

1. On or around March 20, 1995, The Steel Company received CBE's 60-day notice of intent to sue under Section 326(d)(1) of the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 42 U.S.C. § 11046(d)(1). ¶3 of Plaintiff's Complaint. In its notice, CBE alleged that The Steel Company failed to complete and submit certain forms as required by Section 312 and 313 of EPCRA. 42 U.S.C. §§ 11022, 11023.

2. After receiving CBE's notice of intent to sue and before the 60-day notice period had expired, The Steel

Company tasked Gabriel Environmental Services, its environmental consultant, to complete the forms. On May 1, 1995, The Steel Company submitted the completed forms to the appropriate regulatory authorities. (A copy of the transmittal letters accompanying The Steel Company's forms is attached as Exhibit B to The Steel Company's Memorandum in Support.)

3. On August 7, 1995, notwithstanding The Steel Company's having submitted the forms prior to the running of the 60-day notice period, the CBE filed suit against The Steel Company alleging the same violations of EPCRA as alleged in its 60-day notice letter.

4. This Court does not have federal subject matter jurisdiction over this action as there is no case or controversy between The Steel Company and the CBE because The Steel Company was unquestionably in compliance with the requirements of EPCRA before the 60-day notice expired. In the alternative, the CBE's complaint fails to state a cause of action upon which relief can be granted. EPCRA does not authorize a citizens' suit plaintiff, like the CBE, to file suit "for past violations that have been cured by the date the action commences. . . ." *Atlantic State Legal Found., Inc., v. United Musical Instruments*, No. 93-4379, 1995 U.S. App. LEXIS 20469, at *5 (6th Cir. Aug. 3, 1995) (attached as Exhibit A to the Steel Company's Memorandum in Support). See also *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-61 (1987).

5. In support of its Motion to Dismiss, The Steel Company is contemporaneously filing a memorandum of law.

WHEREFORE, Defendant, The Steel Company, respectfully requests that this Court enter an order dismissing plaintiff's complaint.

THE STEEL COMPANY

By: /s/ Leo P. Dombrowski
One of its Attorneys

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